



## *State Of New Hampshire*

**PERSONNEL APPEALS BOARD**  
Department of Administrative Services  
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Concord, New Hampshire 03301  
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### **DECISION OF THE PERSONNEL APPEALS BOARD**

**ALAN MENARD**

**V**

**N.H. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
DIVISION OF CHILDREN, YOUTH & FAMILIES**

**DOCKET # 2020-T-003**

**APPEARANCES:** Attorney Gary Snyder represented the Appellant;

Attorney Rahkiya Medley represented the State.

**WITNESSES:** Kenneth Grillot – Assistant Supervisor – Claremont District Office;  
Maryann Babic-Keith – District Office Supervisor;  
Jennifer Ross-Ferguson – Field Administrator;  
Alan Menard – Appellant;  
Lori Pelletier – CPSW – Concord District Office

**ISSUE OF LAW:** Per 1002.08 (b) (7), (b) (9) and (c) (1) – Termination

Professional and Ethics Policy - Section 1051

**APPEAL HEARING:** The Board held a hearing at the offices of the Public Utilities Commission in Concord,

NH on March 11, 2020 and March 18, 2020.

**APPEAL BOARD:** Marilee Nihan, Gail Wilson and Vice-Chair Norman Patenaude, Esq.

### **BACKGROUND**

The Division of Children Youth and Families ("DCYF") administered progressive discipline to the appellant during 2018 and 2019 and terminated his employment on October 29, 2019. The appellant disputed the validity of the process as well as the sanction and filed an appeal.

## FINDINGS OF FACT

DCYF hired the appellant as a Child Protective Services worker ("CPSW") on April 9, 2010. In that capacity a CPSW must be able to independently assess through investigative methods the safety and wellbeing of children. Cases are assigned to the CPSW's on a rotating basis to calibrate the individual caseloads. The appellant received training upon hire; in addition, he received 30 hours of training annually. DCYF had policies and procedures in place for handling reports of child abuse and neglect.

The appellant was pulled from rotation in August 2018 and was not given any new cases for nine months with the understanding that he would clean up the backlog of contacts and documentation.

The appellant attained the rank of CPSW Level III in 2018. After six months in that position he received a performance review on November 21, 2018 that rated his job performance as substandard based upon unsatisfactory assessments of child safety. In addition, the appellant had failed to satisfy the conditions of a prior corrective action plan ("CAP"), failed to follow the written call-out procedures and engaged in an outburst during a team assessment meeting which constituted insubordination.

On November 28, 2018 he received a first letter of warning ("LOW 1") for insubordination and disrespectful conduct in the workplace that included another CAP with remedial training.

In December 2018 the appellant's immediate supervisor, Kenneth Grillot, created a work plan in an attempt to address the deficiencies in the appellant's job performance including reviews of audio recorded interviews which revealed that the appellant had not addressed the abuse or neglect that was reported in a manner that would assist him to competently assess the safety of the children.

On August 20, 2019 an external assessment review of the district office was performed. Five of the appellant's assessments were given a "red flag" designation which meant that his work on those cases was insufficient to adequately assess child safety with the result that his supervisors concluded that they were unable to trust his judgment.

Later in that same day, August 20, 2019, the appellant received a second letter of warning ("LOW 2") for unsatisfactory work performance and failure to meet standards of professionalism for failure to identify and report dangerous safety issues regarding certain children. The LOW cited his lack of attention to detail and lack of accuracy in his information gathering and assessment process that could have jeopardized a child's safety and which called into question his competency and judgment.

A meeting of intent to discipline was held on October 17, 2019 during which the appellant blamed the size of his caseload for his unsatisfactory performance and disputed the concerns that were presented. However, he acknowledged that his interview skills were deficient and that he often did not ask the right questions. He also acknowledged that his deficient or tardy documentation fell below agency standards and that his work habits and performance had not improved since the last LOW despite the fact that he had been employed by the agency for over nine years.

The appellant was dismissed from service on October 29, 2019.

Kenneth Grillot, the appellant's supervisor, explained that there were monthly staff meetings for members of the assessment/investigative team with respect to performance expectations as well as periodic 1 on 1 time with each investigator. In 2018 Mr. Grillot and other staff members began to have concerns about the quality of the appellant's work, his inability to follow up on open cases, his lack of

contacts which would yield the information needed to verify incoming reports and to determine whether or not to initiate an investigation. Mr. Grillot reported that the appellant missed timeframes more than the average and that his documentation was poor making it difficult to assure a child's safety. Mr. Grillot had to remind the appellant that his cases had to be resolved within 60 days of the opening date and that case aides were available for assistance although the appellant never asked for help. Mr. Grillot took the appellant off rotation for several months in 2018 because he had no confidence in the appellant's ability and even then, the appellant failed to close all his cases. All interviews had to be recorded. When Mr. Grillot listened to some of the appellant's interviews, he concluded that the appellant should have gathered more information and should have asked more questions. He also noted that the appellant needed to enter all direct and collateral contacts into the Bridges computer system in a timely manner.

In the letter of dismissal which he presented to the appellant in October 2019 Mr. Grillo cited five investigations that were characterized as deficient because the follow-up was not timely, the contacts were too few and/or too late and in some cases he failed to initiate collateral contacts with such external partners as the police department and social service agencies. In other instances, the appellant should have filed emergency court petitions. These substandard practices, explained Mr. Grillot, produced insufficient information on which to make sound assessments and other CPSW's had to take over and close some of those files. The appellant had many opportunities to improve his work habits, but he never demonstrated any sustained improvements on his cases. Mr. Grillot concluded that this substandard pattern posed too great a risk to the health, safety and wellbeing of the children.

Mr. Grillot acknowledged that for the period of time in question the average caseload stood between 40 and 60 cases, that the appellant's stood between 30 and 40 cases and that by contrast the national standard was between 8 and 12 cases. CPSW is a tough job, personnel turnover is high and resources are scarce. The Division authorizes up to 12 hours of overtime in each biweekly payroll cycle to process the extra work.

Mr. Grillot acknowledged that LOW 1 issued on November 28, 2018 was predicated on the appellant's insubordination and disrespectful conduct toward others in the office and that it was not similar to LOW 2 that was predicated on performance issues. Following a discussion of the five cases outlined in the LOT Mr. Grillot could not say for sure whether the children involved in those matters had been in any imminent danger or whether it was simply a matter of sloppy documentation.

Mary Ann Babic-Keith is the Claremont District Office Supervisor. She issued LOW 1 in November 2018 for insubordination in violation of the agency's policy on conduct in the workplace. LOW 1 included a CAP for that issue. She issued LOW 2 in August 2019 for unsatisfactory work performance. It too included a CAP for more thorough documentation, timelines for opening investigations and planning assessments and scheduling interviews of victims and collateral contacts and closing files in a timely manner. She had been concerned for some time about the pattern of substandard performance which the appellant had followed for over a year. With respect to the external quality control review of 25 randomly selected assessments, she pointed out that 8 were the appellant's cases and 5 of those were flagged for unsatisfactory work including insufficient contacts, no contacts with collateral sources, untimely follow-up, missing home visits, insufficient documentation and failure to close cases within 60 days. She noted that in spite of available assistance from colleagues and the absence of new cases

during the nine months that the appellant was out of rotation, his performance did not improve, and she remained concerned for the safety of the children.

Jennifer Ross-Ferguson is the field administrator for Child Protective Services. The Claremont District Office sought her advice about the appellant's unsatisfactory work. When she met with him, he blamed the size of his caseload and took no ownership of the problems with poor decision making, insufficient documentation and deficient assessments. She did not trust him to work independently or to appropriately assess the safety of the children. She provided some input into the LOW's and the LOT.

The appellant disputed the factual representations recited in the letter of dismissal. With respect to the five cases cited in that letter, he opined that his contacts were sufficient but acknowledged that the documentation was deficient and that the closures were either late or done by another CPSW. He pointed out that the three disciplinary actions were not similar in nature since LOW 1 was issued for insubordination and had nothing to do with LOW 2 that was issued for unsatisfactory work and on the same date as the external audit that flagged five of his investigations as unacceptable work product. He referred to his good job performance from 2010 to 2018 as evidenced by the performance evaluations he received for those years. He blamed his high case load which stood at 102 when he was fired for his failure to complete the required manual and electronic documentation and initiate judicial protective orders. He said that he would be willing to return to CPSW work as long as there were adequate staffing and resources.

Lori Pelletier worked as a CPSW in the Concord District Office for a while but quit that job because it involved too much field work and paperwork and she only had between 30 and 40 cases. She noted that the current opioid crisis has contributed to an increase in the caseloads and that many CPSW's worked overtime with or without extra pay. She was never penalized for late file entries. In 2019 the NH Legislature authorized and funded 77 new positions for DCYF but as she explained it takes almost a year for a new hire to manage a full caseload independently following orientation and field training. She acknowledged that complete and timely documentation constitutes an important part of case management.

In its closing summation, the State argued that it properly and lawfully terminated the appellant's employment on the basis of one policy violation and two LOW's. The agency's mission, it explained, is to protect the state's children from abuse and neglect and the appellant's performance fell short. Poor documentation and insufficient interviews posed a threat of harm to the children. The appellant's performance did not improve despite feedback from supervisors, removal from the rotation schedule for several months and the CAP's that were incorporated in the LOW's. DCYF administered the disciplinary action including the dismissal with the best interests of the children in mind. It asked the Board to uphold its decision.

The Appellant argued that his errors and omissions did not rise to the level of termination because no harm came to the children who were the subject of the referenced cases and that DCYF did not meet its burden of proof. In his opinion LOW 2 and the LOT are the same and the LOT should have been another LOW. He pointed to mitigating factors such as a high caseload and a good track record for the first nine years on the job. He asked the Board to overturn the dismissal and to reinstate him as a CPSW at DCYF.

## **CONCLUSIONS OF LAW**

The Board concludes that the appellant failed to satisfy his burden of proof and to establish by a preponderance of the evidence that the disciplinary dismissal was unlawful, in violation of administrative rules, unwarranted or unjust in light of the facts in evidence. Per-A:207.12 (b). The Board reached this conclusion in reliance on the following facts.

Investigations of child abuse and neglect constitute the core responsibility of the job of CPSW. The appellant had nine years of experience on the job with a satisfactory record. He received ongoing training and was familiar with the agency's policies and procedures for conducting investigations. Incoming cases were assigned on a rotating basis.

In 2018 the appellant's job performance began to decline and management began to observe a pattern of unsatisfactory work on his cases. He made fewer contacts, failed to follow up on many cases, missed deadlines, exercised poor judgment and failed to document his activities as required by the policies. The situation got so severe that in August 2018 management took the appellant off rotation for nine months in the hope that he could catch up on his cases but even that step did not yield the expected results.

In November 2018 the appellant received an unsatisfactory performance evaluation for poor quality work on some of his cases and for failure to complete the terms of a prior CAP. Some of those cases were the subject of discussion during a team assessment and the appellant responded with an outburst directed at colleagues as well as at supervisors. Shortly thereafter he received the LOW 1 for insubordination and disrespectful conduct in the workplace.

In December 2018 management wrote another CAP after listening to audio recordings of some of his interviews and concluded that they were clearly lacking in substance. Management no longer trusted the appellant to work independently or to appropriately investigate reports of child abuse or neglect.

In October 2019, after it observed no sustained improvement in the appellant's job performance, management held an intent to discipline meeting with him. At that meeting the appellant took no ownership of his unsatisfactory work and blamed the workload for it despite having had nine months between the summer of 2018 and the spring of 2019 to devote exclusively to his backlog of open cases. He admitted that his interviews and documentation were below expectations. Two weeks later, management terminated his employment based on a pattern of unsatisfactory work extending over the previous year and a half and cited five specific investigative reports as examples of errors and omissions.

## **STATUTES AND RULES**

Per 1002.08 (b) – an appointing authority may dismiss an employee without warning for offenses such as, but not necessarily limited to, the following:

(7) Violation of a posted or published agency policy or procedure, the text of which warns that violation of same may result in dismissal;

(9) Endangering the life, health or safety of another employee or individual served by the agency;

Per 1002.08 (c) An appointing authority may dismiss an employee for conduct described in Per 1002.04 when the employee has previously received 2 written warnings for the same or substantially similar type of conduct or offense within a period of 5 years , by issuing a final written warning and notice of dismissal as set forth in this rule;

Professional and Ethics Policy, Section 1051:

II (C) (1) (b) – Staff will conduct themselves with competence, honesty, respect, cultural sensitivity, and professionalism in all interactions, consistent with the NH DCYF Practice Model.

II (D) (1) (b) – Staff must be diligent in their responsibility for documentation while ensuring that all reports are timely, relevant, and accurate pursuant to state and federal laws, policy, and supervisory directives. All information must be:

(D) (2) (b) – All case information must be accurate and factual to contribute to sound decisions affecting client and public safety.

The employer did not satisfy the requirements of Per 1002.08 (c) because the appellant did not receive 2 written warnings for the same or substantially similar type of conduct or offense within a period of 5 years. LOW 1 was for disrespectful conduct in the workplace and LOW 2 was for unsatisfactory work performance. In addition, the employer failed to issue a final warning before it issued the notice of dismissal. Accordingly, the employer could not invoke this provision to dismiss the appellant.

On the other hand, Per 1002.08 (b) (7) and (9) did provide a basis for the employer to dismiss the appellant. First, he violated 2 published policy sections the text of which warned him that violations of same could result in dismissal. Second, the appellant violated the prohibition against unprofessional conduct in the workplace when he engaged in an outburst at a team assessment meeting. Third, he violated the prohibition against endangerment of the life, health or safety of clients served by the agency when he failed to adequately and timely maintain his activity records and to contact parties who were deemed essential to establish solid investigative records that could pass muster in either internal or external audits as documented in an unsatisfactory performance evaluations, several CAP's and LOW 2,

### DECISION

Following a thorough review of the evidence the Board upholds the employer's dismissal of the appellant from its employment and denies his appeal

This is a unanimous decision.



Commissioner Marilee Nihan



Commissioner Gail Wilson



Vice Chair Norman Patenaude, Esq.

April 15, 2020